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## Fields v. Speaker of Pennsylvania House of Representatives

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HEIDI MOORE

*Fields v. Speaker of Pennsylvania House of  
Representatives*

65 N.Y.L. SCH. L. REV. [•] (2020–2021)

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*“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”*

—Justice William J. Brennan<sup>1</sup>

The concept of a separation of religion from government was fundamental to the Founding Fathers’ attempt to prevent the U.S. federal government from coercing individuals into practicing a particular religion.<sup>2</sup> However, the American concept of maintaining the separation of church and state has never meant that there must be an absolute separation of religion from government in all situations.<sup>3</sup> The U.S. Constitution allows the federal government to incorporate religious expression into certain public acts to recognize the religious heritage and culture of the American people.<sup>4</sup> Accordingly, Executive Orders<sup>5</sup> have designated religious holidays as national holidays, an Act of Congress<sup>6</sup> codified the President’s ability to proclaim a National Day of Prayer, and Presidential Proclamations<sup>7</sup> have commemorated religious holidays and festivals.<sup>8</sup> The federal government is also permitted to publicly acknowledge the religious beliefs and practices of the American people when it invites or hires a chaplain to offer a prayer before a governmental lawmaking session to solemnize the occasion.<sup>9</sup>

1. *Larson v. Valente*, 456 U.S. 228, 244 (1982).
2. See Derek H. Davis, *Law, the U.S. Supreme Court, and Religion*, OXFORD RESEARCH ENCYCLOPEDIA 5 (Aug. 2016), <https://oxfordre.com/religion/view/10.1093/acrefore/9780199340378.001.0001/acrefore-9780199340378-e-449> (“The Establishment Clause was the founders’ attempt to end government’s coercive role in directing the religious course of citizens’ lives . . .”).
3. See *id.* (“[T]he American tradition of separation of church and state does not mean that a separation of religion from government is required in all cases.”).
4. See *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (“[The Court has] noted that government cannot be completely prohibited from recognizing in its public actions the religious beliefs and practices of the American people as an aspect of our national history and culture.”).
5. An Executive Order is “a signed, written, and published directive from the President of the United States that manages operations of the federal government.” *What is an Executive Order?*, A.B.A. (Oct. 9, 2020), [https://www.americanbar.org/groups/public\\_education/publications/teaching-legal-docs/what-is-an-executive-order/](https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order/).
6. An Act of Congress is “[a] statute that is formally enacted in accordance with the legislative power granted to Congress by the U.S. Constitution.” *Act of Congress*, BLACK’S LAW DICTIONARY (11th ed. 2019). Prior to becoming an Act of Congress, the bill or resolution must pass in both the House of Representatives and the Senate. *Id.* The National Day of Prayer Act, passed by Congress in 1998, requires the President to “issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals.” 36 U.S.C. § 119.
7. A Presidential Proclamation is an announcement of policy from the President. *Presidential Proclamations*, GEO. L. LIBR. <https://guides.ll.georgetown.edu/c.php?g=365454&p=2468883> (last visited Feb. 10, 2021). “The vast majority of proclamations are issued to announce and support a ceremonial event, such as National African American History Month or National Hurricane Awareness Week.” *Id.*
8. *Lynch*, 465 U.S. at 676–77.
9. See *id.* at 692–93 (O’Connor, J., concurring) (“[S]uch governmental ‘acknowledgements’ of religion as legislative prayers . . . [and] government declaration of Thanksgiving as a public holiday . . . serve . . . the legitimate secular purposes of solemnizing public occasions . . .”).

These “legislative prayers” are intended to lend gravity to the lawmaking practice and inspire legislators to work together for the common good.<sup>10</sup>

Since 1789, with the exception of a brief period in the middle of the nineteenth century,<sup>11</sup> paid chaplains have regularly offered legislative prayers to open lawmaking sessions in both chambers of the U.S. Congress.<sup>12</sup> The first guest chaplains—unpaid local ministers—were invited to open congressional sessions in 1855.<sup>13</sup> Since then, the Senate and the House of Representatives have hosted guest chaplains from all the world’s major religions.<sup>14</sup>

In 2019, the U.S. Courts of Appeals for the Third and Eleventh circuits applied Supreme Court precedent, established in *Marsh v. Chambers*<sup>15</sup> and *Town of Greece v. Galloway*,<sup>16</sup> to address the constitutionality of restrictions on the legislative prayer practices of state legislatures and determine whether the U.S. Constitution permits a state legislature to categorically exclude all persons belonging to religious sects that do not profess a belief in a divine being or God from its guest chaplain programs.<sup>17</sup> The Eleventh Circuit, in *Williamson v. Brevard County*, held that such a restrictive practice violates the Establishment Clause.<sup>18</sup> However, in *Fields v. Speaker of Pennsylvania*

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10. See *Barker v. Conroy*, 921 F.3d 1118, 1128 (D.C. Cir. 2019) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 575 (2014)) (stating that legislative prayer is a “symbolic expression” that merely “lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society”).
  11. See IDA A. BRUDNICK, CONG. RSCH. SERV., R41807, HOUSE AND SENATE CHAPLAINS: AN OVERVIEW 2 (2011) (explaining that, in December 1857, both the U.S. Senate and the U.S. House of Representatives resolved to invite local clergy to officiate as unpaid guest chaplains in lieu of hiring official paid congressional chaplains, but were later forced to abandon the guest chaplain program when it became difficult to find chaplains willing to work without pay); see also S. JOURNAL, 35th Cong., 1st Sess. 34–35 (1857); see also H. JOURNAL, 35th Cong., 1st Sess. 77–78 (1857).
  12. See BRUDNICK, *supra* note 11, at 1–2 (explaining the history of U.S. Congressional legislative chaplains).
  13. See Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171, 1200 (2009) (noting that after the Thirty-Fourth Congress opened in 1855, the U.S. House of Representatives passed a resolution to allow unpaid local ministers to offer opening prayers at House sessions instead of the institutional, paid chaplains that previously offered opening prayers).
  14. See *Senate Chaplain*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/common/briefing/Senate\\_Chaplain.htm](https://www.senate.gov/artandhistory/history/common/briefing/Senate_Chaplain.htm) (last visited Feb. 10, 2021) (listing the names and religious denominations of the chaplains who have served as the Senate’s chaplain, dating back to April 25, 1789).
  15. 463 U.S. 783 (1983).
  16. 572 U.S. 565 (2014).
  17. See *Fields v. Speaker of Pa. House of Rep.*, 936 F.3d 142, 149 (3d Cir. 2019) (“Principally before us is whether the Pennsylvania House may intentionally exclude nontheists from offering prayers to open the legislative session.”); see also *Williamson v. Brevard Cnty.*, 928 F.3d 1296, 1299 (11th Cir. 2019) (“Brevard County has selected invocation speakers in a way that favors certain monotheistic religions and categorically excludes from consideration other religions solely based on their belief systems. Brevard County’s process of selecting invocation speakers thus runs afoul of the Establishment Clause.”).
  18. 928 F.3d at 1299.

*House of Representatives*, the Third Circuit held that this practice did not violate the Establishment Clause, and thus created a circuit split.<sup>19</sup>

This Case Comment contends that the U.S. Court of Appeals for the Third Circuit erred in *Fields* when it held that it is constitutionally permissible for Pennsylvania’s State House of Representatives (“Pennsylvania House”) to intentionally and categorically exclude nontheists<sup>20</sup> from its guest chaplain program.<sup>21</sup> First, *Fields* erred when it misapplied *Marsh*’s “history and tradition” test by not considering whether categorically excluding nontheists from a legislative guest chaplain program fits within the “history and tradition” followed by the U.S. Congress.<sup>22</sup> Second, *Fields* erred when it failed to consider whether the Pennsylvania House’s categorical exclusion of nontheists from its guest chaplain program stemmed from an impermissible motive, such as proselytizing or promoting, discriminating against, or disparaging any faith or belief.<sup>23</sup>

The Pennsylvania House begins its daily sessions with an opening prayer led by an invited guest chaplain or House member.<sup>24</sup> Guest chaplains wishing to deliver an opening prayer must be a “member of a regularly established church or religious organization” and must be recommended by a State Representative.<sup>25</sup> Pennsylvania House rules require that the prayer’s content help the Representatives “seek divine intervention in their work and their lives.”<sup>26</sup> The Speaker of the Pennsylvania House at the time of litigation and his predecessor both interpreted this rule to necessitate a

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19. 936 F.3d at 147. A circuit split is “[w]hen two or more circuits in the United States court of appeals reach opposite interpretations of federal law. This is sometimes a reason for the Supreme Court to grant certiorari.” *Circuit Split*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/circuit\\_split](https://www.law.cornell.edu/wex/circuit_split) (last visited Feb. 10, 2021).
  20. The U.S. Court of Appeals for the Third Circuit defined nontheists as individuals “who do not espouse belief in a god or gods, though [are] not necessarily atheists . . . .” *Fields*, 936 F.3d at 146. The U.S. District Court for the Middle District of Pennsylvania designated nontheists as “atheists, agnostics, Secular Humanists, freethinkers, and other persons who do not believe in a deity.” *Fields v. Speaker of the Pa. House of Rep.*, 251 F. Supp. 3d 772, 775 (M.D. Pa. 2017).
  21. *Compare Fields*, 936 F.3d at 154 (“[B]ecause history guides our inquiry in matters of legislative prayer, the Pennsylvania House may insist on traditional, theistic prayers.”), *with Williamson*, 928 F.3d at 1299 (“[I]n selecting invocation speakers, the Commissioners may not categorically exclude from consideration speakers from a religion simply because they do not like the nature of its beliefs.”).
  22. *See Fields*, 936 F.3d at 149–53 (conducting a “history and tradition” analysis of the Pennsylvania House’s preference of theistic over nontheistic prayers and its restrictions to religious prayer but failing to analyze whether specifically excluding nontheists from offering prayer is consistent with the “history and tradition” of the U.S. Congress).
  23. *See id.* at 157 (stating that the court would not address the issue of whether “a policy of nondiscrimination” is needed to render a prayer practice constitutional”). *But see Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983) (“The content of the prayer is not of concern to judges where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.”).
  24. *Fields*, 936 F.3d at 146–47.
  25. *Id.*
  26. *Id.* at 147.

categorical exclusion of all nontheists—those who practice any religion that does not profess a belief in a divine being or God—from the guest chaplain program.<sup>27</sup>

The *Fields* plaintiffs are nontheists and are active adherents to the religious principles in their respective religious communities.<sup>28</sup> The plaintiffs' respective religious communities embrace religious practices and celebrations similar to those of a church or synagogue.<sup>29</sup> However, their religions do not profess a belief in a divine being or God.<sup>30</sup> When the plaintiffs requested the opportunity to offer an opening prayer at a Pennsylvania House's legislative session, they were denied, solely because their invocations would not appeal to a divine being or God.<sup>31</sup>

The plaintiffs filed suit in August 2016 in the U.S. District Court for the Middle District of Pennsylvania against the Pennsylvania House Speaker, its Parliamentarian,<sup>32</sup> and various State Representatives,<sup>33</sup> alleging that the House's practice of categorically excluding nontheists from participating in the guest chaplain program violated the Establishment,<sup>34</sup> Freedom of Speech,<sup>35</sup> Free Exercise,<sup>36</sup> and

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27. *See id.* The Speaker believed that when a religion does not require its adherents to profess a belief in a "divine being" or "higher power," the adherents are "incapable of providing an opening invocation" that accommodates "the spiritual needs of the lawmakers" or that solicits "divine guidance for the benefit of the legislators." *See Fields v. Speaker of Pa. House of Rep.*, 327 F. Supp. 3d 748, 763 (M.D. Pa. 2018) (internal quotations omitted). The current Speaker and his predecessor also testified in their depositions that, in addition to nontheists, they would also reject guest chaplains "of other minority religions of which they disapprove, including polytheis[m], deism, religions that believe in spirits . . . , religions that do not believe in any god, and religions that pray to what the Speaker considers a 'malevolent' . . . force instead of a 'benevolent' one." Brief of Appellees/Cross-Appellants Brian Fields, et al. at 13–14, *Fields*, 936 F.3d 142 (No. 1-16-cv-01764), 2019 WL 913486. One Representative "testified that he would reject a guest chaplain who would not pray to the 'appropriate version of [the] divine.'" *Id.* at 14. The deponents further testified that they would determine whether a proposed invocation was permissible by considering "factors such as whether the invocation mentions a supreme being, whether that being is 'benevolent' or 'malevolent,' whether the invocation is a request or merely a message of praise, how long the invocation is, and whether it expressly contains words such as 'let us pray.'" *Id.* at 15.
  28. *Fields v. Speaker of Pa. House of Rep.*, 251 F. Supp. 3d 772, 775–76 (M.D. Pa. 2017) (explaining that the plaintiffs are founders and ordained leaders in their respective atheist, agnostic, Secular Humanist, and free-thinking belief communities, none of which profess a belief in a divine being or God).
  29. *Fields*, 936 F.3d at 147–48.
  30. *Id.* at 148.
  31. *Id.* at 147–48.
  32. A Parliamentarian is "an expert in the rules or usages of a parliament or other deliberative assembly." *Parliamentarian*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002).
  33. Defendants were named only in their official capacities. *Fields*, 251 F. Supp. 3d at 778.
  34. The Establishment Clause is the First Amendment provision "that prohibits the federal and state governments from establishing an official religion, or from favoring or disfavoring one view of religion over another." *Establishment Clause*, BLACK'S LAW DICTIONARY (11th ed. 2019).
  35. The Freedom of Speech Clause is the First Amendment provision that grants "[t]he right to express one's thoughts and opinions without governmental restriction, as guaranteed by the First Amendment of the U.S. Constitution." *Freedom of Speech*, BLACK'S LAW DICTIONARY (11th ed. 2019).
  36. The Free Exercise Clause is "[t]he First Amendment constitutional provision . . . prohibiting the government from interfering in people's religious practices or forms of worship." *Free Exercise Clause*,

Equal Protection<sup>37</sup> clauses of the U.S. Constitution.<sup>38</sup> The plaintiffs sought injunctive relief requiring the Pennsylvania House to permit nontheistic speakers to participate in the House’s guest chaplain program and further sought to enjoin the defendants from discriminating against nontheists.<sup>39</sup>

The district court found that the plaintiffs had standing<sup>40</sup> to assert their claims,<sup>41</sup> and granted in part and denied in part<sup>42</sup> the defendants’ motion to dismiss.<sup>43</sup> The court dismissed the plaintiffs’ Free Exercise, Free Speech, and Equal Protection claims, but permitted the Establishment Clause claim to proceed.<sup>44</sup> The parties then filed cross motions for summary judgment<sup>45</sup> in the district court.<sup>46</sup> In deciding the cross motions, the court found that the plaintiffs would suffer irreparable injury<sup>47</sup> should the Pennsylvania House be allowed to continue its practice of categorical exclusion of nontheists and, on that basis, entered partial summary judgment in favor

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BLACK’S LAW DICTIONARY (11th ed. 2019).

37. The Equal Protection Clause is “[t]he Fourteenth Amendment provision requiring the states to give similarly situated persons or classes similar treatment under the law.” *Equal Protection Clause*, BLACK’S LAW DICTIONARY (11th ed. 2019).
38. *Fields*, 251 F. Supp. 3d at 778–80. The plaintiffs also raised additional Establishment Clause, Free Exercise, Free Speech, and Equal Protection claims against the House’s practice of asking guests to “please rise” before the opening prayer. *Id.*
39. *Id.* at 778.
40. Standing is “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.” *Standing*, BLACK’S LAW DICTIONARY (11th ed. 2019).
41. *Fields*, 251 F. Supp. 3d at 782 (“We are satisfied that plaintiffs have standing under the Free Speech, Free Exercise, and Equal Protection clauses, and we will proceed to a merits analysis on these claims.”).
42. *Id.* at 792.
43. A motion to dismiss is “a request that the court dismiss the case because of settlement, voluntary withdrawal, or a procedural defect.” *Motion to Dismiss*, BLACK’S LAW DICTIONARY (11th ed. 2019).
44. *Fields*, 251 F. Supp. 3d at 792.
45. A motion for summary judgment is “a request that the court enter judgment without a trial because there is no genuine issue of material fact to be decided by a fact-finder—that is, because the evidence is legally insufficient to support a verdict in the nonmovant’s favor.” *Motion for Summary Judgment*, BLACK’S LAW DICTIONARY (11th ed. 2019).
46. *See Fields v. Speaker of Pa. House of Rep.*, 327 F. Supp. 3d 748, 754 (M.D. Pa. 2018) (explaining that after the Free Exercise, Free Speech, and Equal Protection claims were dismissed, the plaintiffs amended their complaint to add additional plaintiffs and defendants, and upon completion of discovery, the plaintiffs filed cross-motions for summary judgment for the Establishment Clause claims).
47. *Id.* at 766 (explaining that to obtain a permanent injunction, plaintiffs must prove that (1) “they will suffer irreparable injury . . . ;” (2) “legal remedies are inadequate to compensate that injury;” (3) “balancing of the respective hardships between the parties warrants” an equitable remedy; and (4) “the public interest is not disserved by an injunction’s issuance”).

of the plaintiffs and granted their request for permanent injunctive relief.<sup>48</sup> The parties then filed cross appeals in the U.S. Court of Appeals for the Third Circuit.<sup>49</sup>

The custom of opening legislative sessions with a prayer began when the First Continental Congress<sup>50</sup> hired Jacob Duché, rector of Christ Episcopal Church in Philadelphia, to serve as its legislative chaplain.<sup>51</sup> In 1789—only three days before settling on the language of the Establishment Clause prohibiting the federal and state governments from establishing an official religion—Congress enacted a statute authorizing the appointment of paid chaplains who would, among other duties, offer opening prayers at its legislative sessions.<sup>52</sup> Since that time, the Supreme Court has addressed the constitutionality of legislative prayers only twice—once in 1983, in the landmark case *Marsh v. Chambers*, and again in 2014, in *Town of Greece v. Galloway*.<sup>53</sup>

Although the Supreme Court found the practice of legislative prayer to be intrinsically constitutional in *Marsh*,<sup>54</sup> whether and how religious liberties are compromised within the sphere of legislative prayer remains a topic of controversy in the courts and academia.<sup>55</sup> Neither *Marsh* nor *Greece* established a constitutional

48. *Id.* (quoting *Jamal v. Kane*, 105 F. Supp. 3d 448, 462–63 (M.D. Pa. 2015)) (“[I]njunctive relief is ‘especially appropriate’ when First Amendment rights are violated, because money damages are usually inadequate relief.”). Since there was “no adequate legal remedy to compensate plaintiffs’ constitutional injuries, declaratory and injunctive relief will ensure that plaintiffs do not continue to suffer irreparable harm.” *Id.*

49. *Fields v. Speaker of Pa. House of Rep.*, 936 F.3d 142, 149 (3d Cir. 2019). The plaintiffs also filed a precautionary cross-appeal to preserve the dismissal of their Free Exercise, Free Speech, and Equal Protection claims. Brief of Appellees/Cross-Appellants Brian Fields, et al., *supra* note 27, at 22.

50. The First Continental Congress was comprised of delegates from each of the thirteen American colonies except Georgia; in September 1774, it convened in response to new measures that the British government placed on the colonies. *Continental Congress*, HISTORY.COM (last updated Jan. 14, 2020), <https://www.history.com/topics/american-revolution/the-continental-congress>. The First Continental Congress “issued a Declaration of Rights, affirming its loyalty to the British Crown but disputing the British Parliament’s right to tax it.” *Id.* The Congress also “passed the Articles of Association, which called on the colonies to stop importing goods from [Britain]” if Britain continued to issue taxes. *Id.*

51. BRUDNICK, *supra* note 11, at 1.

52. *See Marsh v. Chambers*, 463 U.S. 783, 788–89 (1983) (noting that Congress enacted the statute authorizing paid legislative chaplains on September 22, 1789 and settled on the Bill of Rights language on September 25, 1789).

53. *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Marsh*, 463 U.S. at 793–94. The Supreme Court denied cert to two subsequent legislative prayer appeals from the Fourth and Sixth Circuits. Chad West, Note, *Legislative Prayer: Historical Tradition and Contemporary Issues*, 19 UTAH L. REV. 709, 719 (2019). The cases that were denied certiorari dealt with legislator-led invocations which raise different issues under *Marsh*’s “history and tradition” analysis than the guest chaplain programs discussed in this Case Comment. *Id.* at 716–17. *See Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017); *see also Bormuth v. County of Jackson*, 870 F.3d 494 (6th Cir. 2017).

54. *See Marsh*, 463 U.S. at 792 (“To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.”).

55. *See Lund*, *supra* note 13, at 1174 (“While the *Marsh* Court attempted to defuse the issues connected with legislative prayer, it refused to commit legislative prayer entirely to the political process . . . [L]egislative prayer disputes have stormed the federal courts, law reviews, and the public consciousness.”).



boundary limiting restrictions on legislative prayer practices.<sup>56</sup> Thus, cases brought before the lower courts in the thirty-six years since *Marsh* continually challenge the judiciary to define the scope of constitutionally permissible restrictions on the content of legislative prayer and the selection of guest chaplains.<sup>57</sup> These cases generally present one of three fact patterns: prayers led by appointed and paid clergy;<sup>58</sup> prayers led by legislators or other government officials;<sup>59</sup> or prayers led by invited or volunteer guest chaplains.<sup>60</sup>

*Marsh* came before the Supreme Court in 1983, approximately forty years after the Court incorporated the Establishment Clause through the Fourteenth Amendment and applied it to the states.<sup>61</sup> It was the first time the Court heard a legislative prayer claim brought against a state legislature.<sup>62</sup> In *Marsh*, the Court analyzed whether the Nebraska Legislature’s sixteen-year practice of having a publicly-funded Presbyterian chaplain offer the opening prayer at the beginning of each legislative session violated the Establishment Clause.<sup>63</sup>

On *de novo* review of the lower court’s ruling, *Marsh* declined to apply settled Establishment Clause jurisprudence<sup>64</sup> to address the constitutionality of legislative

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56. See *Greece*, 572 U.S. at 577 (“*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted.”).

57. See Lund, *supra* note 13, at 1174 (“[T]he Marsh Court . . . has left lower courts struggling with a number of questions [including] whether certain types of prayers are constitutionally impermissible . . . and whether [the government] can pick and choose which religious groups have the opportunity to pray.”).

58. See, e.g., *Marsh*, 463 U.S. at 784–85 (legislative chaplain paid out of public funds).

59. See, e.g., Lund v. Rowan Cnty., 863 F.3d 268, 271–72 (4th Cir. 2017) (lawmaker-led invocations); Bormuth v. Cnty. of Jackson, 870 F.3d 494, 498 (6th Cir. 2017) (government Board member-led invocations).

60. See, e.g., *Greece*, 572 U.S. at 565 (invited clergy); Fields v. Speaker of Pa. House of Rep., 936 F.3d 142, 146 (3d Cir. 2019) (invited clergy); Williamson v. Brevard Cnty., 928 F.3d 1296, 1298–99 (11th Cir. 2019) (invited clergy); Barker v. Conroy, 921 F.3d 1118, 1121 (D.C. Cir. 2019) (volunteer clergy).

61. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (holding that the Establishment Clause prevents both state and federal governments from establishing religion). Prior to *Everson*, the Establishment Clause applied only to the federal government and cases decided in the federal courts, meaning that states and state courts were under no obligation to adopt similar laws. *Id.*

62. Amanda Voeller, Comment, *A Leap of Faith: Questioning the Constitutionality of Texas’s Legislative Prayer Practice*, 51 Tex. TECH L. REV. 305, 315 (2019) (recognizing that *Marsh* was the “landmark case on the issue of legislative prayer”).

63. 463 U.S. at 792–93.

64. Prior to *Marsh*, courts routinely evaluated government policies and conduct for Establishment Clause violations by applying one of three tests: the coercion test, the endorsement test, or the *Lemon* test. See *Lee v. Weisman*, 505 U.S. 577 (1992) (coercion test); Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (endorsement test); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*Lemon* test). Justice Brennan pointed out in his *Marsh* dissent that legislative prayer would have been found unconstitutional under the 1971 “*Lemon* test,” which identified three requirements that a law must meet in order to not violate the Establishment Clause: “(1) the statute must have a secular legislative purpose; (2) [the statute’s] principal or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster an excessive government entanglement with religion.” Voeller, *supra* note 62, at 311, 316 (internal quotations omitted).

prayer practices.<sup>65</sup> Instead, the Court explained that it would not conclude that legislative prayer constituted an establishment of religion when it was clear that the First U.S. Congress (“First Congress”) did not believe that the Establishment Clause forbade the practice.<sup>66</sup>

The Court concluded that state legislative prayer was constitutionally tolerable because it would be inconsistent for the Court to impose a more narrow interpretation of the First Amendment on the states than the Framers imposed on the federal government.<sup>67</sup> Consequently, *Marsh* carved out an exception to the prior Establishment Clause jurisprudence—the *Marsh* history and tradition inquiry—and held that religious prayer before governmental lawmaking bodies is inherently constitutional because of its distinctive “history and tradition” dating back to the First Continental Congress.<sup>68</sup>

The *Marsh* Court then applied this “history and tradition” inquiry and held that the Nebraska Legislature’s practice of maintaining the same publicly-funded Presbyterian chaplain for sixteen years did not establish a religion because it was similar to the historical practice of the First Congress.<sup>69</sup> The Court further explained that it might have reached a different conclusion had Nebraska’s legislature exploited the prayer opportunity to proselytize or advance any one religion, or discriminate against or disparage any other religion.<sup>70</sup> Choosing a chaplain for one of these “impermissible motives” might have been sufficient to find that the Nebraska Legislature had violated the Establishment Clause.<sup>71</sup> The Court cautioned that a

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65. See Voeller, *supra* note 62, at 316 (“The [*Marsh*] Court upheld the constitutionality of the prayer practice without employing any of the commonly used tests to determine whether an action violates the Establishment Clause . . . .”); see also *Marsh*, 463 U.S. at 786–92 (noting that the lower court had applied the three-part *Lemon* test, yet proceeding with a “history and tradition” analysis of the legislative prayer practice).

66. See *Marsh*, 463 U.S. at 789–91 (explaining that, because Congress settled on the Establishment Clause’s wording in the same week that it agreed to hire and pay Congressional chaplains, Congress did not intend for the Establishment Clause to forbid the practice of legislative prayer). But see *id.* at 816 (Brennan, J., dissenting) (“The first 10 Amendments were not enacted because the members of the First Congress came up with a bright idea one morning; rather, their enactment was forced upon Congress by a number of the States as a condition for their ratification of the original Constitution. To treat any practice authorized by the First Congress as presumptively consistent with the Bill of Rights is therefore somewhat akin to treating any action of a party to a contract as presumptively consistent with the terms of the contract.”).

67. *Id.* at 790–91 (majority opinion).

68. See *id.* at 792–94 (“In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that . . . [legislative] prayer has become part of the fabric of our society . . . . [It] is not, in these circumstances, an ‘establishment’ of religion . . . it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.”).

69. *Id.* at 793–94.

70. See *id.* at 794–95 (“The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.”).

71. *Id.* at 793–95. The *Marsh* Court reasoned that the evidence showed that the clergyman’s long tenure was not attributable to an impermissible motive in his rehiring. *Id.* at 793–94. He was reappointed simply because his personal performance and character were acceptable to the appointing body. *Id.* at 793.

connection to a history of uncorrected constitutional violations would be insufficient to absolve a legislature of conduct that has since been deemed unconstitutional.<sup>72</sup> Accordingly, *Marsh* limited the constitutional boundary of legislative prayer to those legislative prayer practices that mirror historical practice without attempting to proselytize, promote, discriminate against, or disparage any faith or belief.<sup>73</sup>

Thirty-one years later, in 2014, the Supreme Court reaffirmed *Marsh*'s "history and tradition" constitutional standard in *Greece*.<sup>74</sup> *Greece* upheld a New York town's practice of inviting guest chaplains to offer an opening prayer at monthly board meetings by contacting clergy listed in a local directory of religious congregations.<sup>75</sup> The Court reasoned that although a majority of the prayer givers turned out to be Christian, there was no evidence that the choice of clergy stemmed from bias or aversion to chaplains of other faiths.<sup>76</sup> The Court explained that, as a general matter, the U.S. Constitution permits both secular and non-secular legislative prayers.<sup>77</sup> Accordingly, the Court explained that the judiciary should not concern itself with the resulting content of the prayers, unless there was an indication that the prayer opportunity was exploited to proselytize, advance any one religion, or to disparage or discriminate against any other religion.<sup>78</sup> Finally, the Court held that, once any governing body opens the legislative prayer opportunity to the public, guest clergy must be allowed to invoke the religious beliefs dictated by their conscience.<sup>79</sup>

Together, *Marsh* and *Greece* establish the fact-intensive, three-step constitutional inquiry used to evaluate a legislative guest chaplain selection practice: (1) identify the essential features of the practice; (2) determine whether those essential features fall within the "history and tradition" of legislative prayer that the Court has found to be

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72. See *id.* at 790 ("Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . .").

73. *Id.* at 794–95; see also John Gavin, Comment, *Praying for Clarity: Lund, Bormuth, and the Split Over Legislator-Led Prayer*, 59 B.C. L. REV. E-SUPP. 104, 112 (2018) (footnote omitted) ("The Court has therefore established a fine line between reverence to history and faithfulness to the First Amendment, which requires courts to look to historical practices to establish the Framers' intent, without relying solely on those practices.").

74. *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014) ("The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures.").

75. *Id.* at 570–71.

76. *Id.* at 571, 585 ("That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths.").

77. See *id.* at 580–81 (quoting *Marsh*, 463 U.S. at 794–95) ("*Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content . . . . To the contrary, the [*Marsh*] Court instructed that the 'content of the prayer is not of concern to judges' . . .").

78. *Id.* at 581 (quoting *Marsh*, 463 U.S. at 794–95).

79. *Id.* at 582.

in accord with the Establishment Clause; and (3) determine whether the practice stemmed from an impermissible motive.<sup>80</sup>

The U.S. Court of Appeals for the Third Circuit relied upon this three-step constitutional inquiry in *Fields v. Speaker of Pennsylvania House of Representatives* when deciding the parties' cross appeals in 2019.<sup>81</sup> In its cross-appeal,<sup>82</sup> the Pennsylvania House argued that the district court erred in finding that the House's legislative prayer practices violated the Establishment Clause because an explicit preference for "traditional religious prayer" does not establish a religion under *Marsh* or *Greece*.<sup>83</sup> The Pennsylvania House further argued that *Greece* does not require inclusion of nontheists in legislative prayers because the Supreme Court has defined legislative prayer as a "solicitation of Divine guidance."<sup>84</sup> Finally, the Pennsylvania House argued that it is constitutionally permissible to discriminate in favor of two or more individual religions<sup>85</sup> because such a practice would be more inclusive than the primarily-Christian legislative prayer practice upheld in *Marsh*.<sup>86</sup>

The plaintiffs argued in their cross-appeal that the district court correctly held that the Pennsylvania House's guest chaplain selection process violated the Establishment Clause under *Greece* because the process advanced theism by intentionally discriminating against nontheists.<sup>87</sup> The plaintiffs further argued that *Greece* did not limit its prohibition against discrimination in the guest chaplain selection process to discrimination that prefers a single religion.<sup>88</sup>

The Third Circuit held in *Fields* that the Pennsylvania House's intentional and categorical exclusion of nontheists from the guest chaplain selection program did not

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80. *See id.* at 577, 581 (examining whether the features of Greece's prayer practice fit within the tradition of Congress and state legislatures and whether the practice stemmed from an impermissible motive); *see also* *Marsh v. Chambers*, 463 U.S. 783, 793–94 (1983) (analyzing whether hiring the Presbyterian chaplain for sixteen years fit within the tradition of the legislative prayer and whether such employment of the chaplain stemmed from an impermissible motive). *See also* Gavin, *supra* note 73, at 117 ("The fact sensitive nature of [the Establishment Clause] analysis, which was recognized in *Town of Greece*, . . . necessitates an in depth analysis of all of the facts surrounding a challenged practice . . .").

81. 936 F.3d 142, 149 (3d Cir. 2019).

82. A cross-appeal is "[a]n appeal by the appellee, usually heard at the same time as the appellant's appeal." *Cross-Appeal*, BLACK'S LAW DICTIONARY (11th ed. 2019).

83. Second Brief of Appellants/Cross-Appellees at 2–6, *Fields*, 936 F.3d 142 (No. 1-16-cv-01764), 2019 WL 1568018.

84. *See id.* at 4 (emphasis omitted) ("[A]ccepting appellees' arguments means this Court . . . [m]ust accept that Greece requires nonbeliever inclusion in a practice the Supreme Court has repeatedly described as a solicitation of 'Divine guidance' . . . [A]ppellees' arguments fail—often spectacularly—in theory and practice . . .").

85. The House referred to this idea as the "two-sect rule." *Fields*, 936 F.3d at 154.

86. *See id.* ("The House . . . urges that '[h]istory confirms the constitutionality of prayer practices far more exclusive' than the theists-only rule . . . [because] by approving the sole use of a chaplain from a *single* sect for 16 years, *Marsh* was even more exclusive.").

87. Brief of Appellees/Cross-Appellants Brian Fields, et al. at 25–28, *Fields*, 936 F.3d 142 (No. 1-16-cv-01764), 2019 WL 993956.

88. *Id.* at 29.

violate the Establishment Clause because only theistic invocations can satisfy the necessary goal of historical legislative prayer—the ability to solicit divine guidance.<sup>89</sup> The court reasoned that because nontheists are fundamentally unable to “offer religious prayer in the historical sense,” their exclusion from the guest chaplain program was not discriminatory.<sup>90</sup> The court further reasoned that despite the Supreme Court’s prohibition against religious discrimination, it has never required that legislatures permit secular opening prayers.<sup>91</sup> Accordingly, the court held that a guest chaplain selection policy resulting in only theistic prayers was constitutionally permissible, and the Pennsylvania House could therefore “insist” on theistic opening invocations.<sup>92</sup>

In his dissent, Judge Luis Felipe Restrepo argued that because the majority’s formulation of the question at issue in *Fields* was overly broad, it completely neglected the defining feature of the Pennsylvania House’s guest chaplain selection process—the intentional exclusion of prayer givers solely because of their religious beliefs.<sup>93</sup> Judge Restrepo explained that the intentional exclusion of entire religious sects or individuals who hold certain religious beliefs “has never been countenanced in the history of legislative prayer in the United States.”<sup>94</sup> He further explained that the Pennsylvania House’s guest chaplain selection process unconstitutionally advanced theistic religions by lending the State’s “power and prestige” to the idea that God does indeed exist.<sup>95</sup> Finally, Judge Restrepo stated that even if there were a connection between the Pennsylvania House’s guest chaplain selection process and historical practice, such a connection would be insufficient to cure the unconstitutional discrimination and violation of the Establishment Clause’s requirement that no religion be preferred over any other.<sup>96</sup> Judge Restrepo therefore concluded that the Pennsylvania House’s process violates the Establishment Clause.<sup>97</sup>

The Third Circuit erred in *Fields* when it held that it is constitutionally permissible for the Pennsylvania House to intentionally and categorically exclude nontheists from its guest chaplain program.<sup>98</sup> First, the *Fields* court misapplied

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89. *Fields*, 936 F.3d at 151–52.

90. *Id.* at 153–54.

91. *Id.* at 157 (quoting *Barker v. Conroy*, 921 F.3d 1118, 1131 (D.C. Cir. 2019)).

92. *Id.* at 154, 163.

93. *Id.* at 166–67 (Restrepo, J., concurring in part and dissenting in part).

94. *Id.* at 167.

95. *See id.* at 168 (“[W]hen, as here, the government subjects prospective guest chaplains to a litmus test of whether they believe in the existence of a ‘higher power’ or God, the government actively lends its power and prestige to the religious theory that a ‘higher power’ or God indeed exists . . .”).

96. *See id.* (quoting *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968)) (“At its core, the Establishment Clause requires the government to remain ‘neutral in matters of religious theory, doctrine, and practice,’ and the government ‘may not aid, foster, or promote one religion or religious theory against another.’”).

97. *Id.* at 170.

98. *Compare id.* at 154 (majority opinion) (“[B]ecause history guides our inquiry in matters of legislative prayer, the Pennsylvania House may insist on traditional, theistic prayers.”), *with* *Williamson v. Brevard*

*Marsh*'s "history and tradition" test by not considering whether categorically excluding nontheists from a legislative guest chaplain program fits within the "history and tradition" followed by Congress.<sup>99</sup> Identifying the essential features of the guest chaplain selection process at issue is paramount to performing the proper constitutional inquiry under *Marsh*.<sup>100</sup> Only when the essential features of the process at issue "fit[] within the tradition long followed in Congress and the state legislatures" will the court find the process constitutional.<sup>101</sup>

*Marsh* held that the Nebraska Legislature's process of maintaining the same publicly-funded Presbyterian legislative chaplain for sixteen years aligned with congressional tradition because the First Continental Congress and the First U.S. Congress similarly hired and retained clergy who continued to perform successfully in their jobs.<sup>102</sup> *Greece* held that a town's informal practice of selecting guest chaplains from a local phone directory comported with congressional tradition, even though almost all of the local congregations in the directory were Christian.<sup>103</sup> The Court held that the town's practice resembled a historical tradition of legislators tolerating and appreciating prayers offered by individuals of different faiths.<sup>104</sup>

In *Bormuth v. County of Jackson*, the Sixth Circuit held in 2017 that a practice of choosing County Commissioners to offer opening prayers instead of chaplains fell within our nation's historical traditions, even when every Commissioner offering the prayer was Christian.<sup>105</sup> *Bormuth* reasoned that, absent an intent to proselytize or

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Cnty., 928 F.3d 1296, 1299 (11th Cir. 2019) ("[I]n selecting invocation speakers, the Commissioners may not categorically exclude from consideration speakers from a religion simply because they do not like the nature of its beliefs.").

99. See *Fields*, 936 F.3d at 149–153 (conducting a "history and tradition" analysis of the Pennsylvania House's preference of theistic over nontheistic prayers and its restrictions to religious prayer but failing to analyze whether specifically excluding nontheists from offering prayer is consistent with the "history and tradition" of the U.S. Congress).

100. See *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) ("We turn then to the question of whether any features of the Nebraska practice violate the Establishment Clause.").

101. See *Town of Greece v. Galloway*, 572 U.S. 565, 577, 587 (2014) ("The prayer opportunity . . . must be evaluated against the backdrop of historical practice.").

102. See *Marsh*, 463 U.S. at 793–94 (explaining that it was immaterial that public funds paid for a religious chaplain to offer opening invocations because the First Continental Congress and the First U.S. Congress also used public funds for this purpose).

103. See *Greece*, 572 U.S. at 585–86 ("[T]he Constitution does not require [the town of Greece] to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.").

104. See *id.* at 584 ("Our tradition assumes that adult citizens . . . can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith."); see also *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2088–89 (2019) (alteration in original) (quoting *Greece*, 572 U.S. at 577) ("[T]he specific practice challenged in . . . *Greece* lacked the very direct connection, via the First Congress, to the thinking of those who were responsible for framing the First Amendment. But what mattered was that the town's practice 'fi[t] within the tradition long followed in Congress and the state legislatures.'").

105. 870 F.3d 494, 509–10 (6th Cir. 2017).



advance Christianity, the historical pedigree of legislative prayer supported both legislator-led and clergy-led prayers.<sup>106</sup>

The courts in *Marsh*, *Greece*, and *Bormuth* properly compared the essential features of their respective chaplain selection processes to historical practices to determine the constitutionality of the processes.<sup>107</sup> The essential feature in *Marsh* was the sixteen-year term of a paid Presbyterian minister.<sup>108</sup> In *Greece*, it was the town's method of inviting clergy from a local phonebook.<sup>109</sup> Although the town never excluded or denied the prayer opportunity to any religious denomination (including atheists), the vast majority of clergy who accepted the invitation were Christian.<sup>110</sup> In *Bormuth*, the essential feature considered by the court was the choice to have the legislators lead the prayers instead of clergy.<sup>111</sup>

In stark contrast, *Fields* did not perform its “history and tradition” inquiry on the essential feature of the Pennsylvania House’s speaker selection process—the categorical exclusion of all nontheists.<sup>112</sup> Instead, *Fields* focused its inquiry on the content of the resulting prayer.<sup>113</sup> The court examined whether a practice resulting in solely theistic invocations was consistent with the Framers’ historical practices.<sup>114</sup> The court then explained that, because history has made clear that only theistic invocations can accomplish the traditional goals of legislative prayer, a categorical exclusion of all nontheistic invocations is supported by historical tradition.<sup>115</sup> However, *Marsh*’s constitutional inquiry does not turn, as *Fields* concluded, on whether the content of the prayer delivered can fulfill each and every purported goal

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106. See *id.* at 512 (quoting *Greece*, 572 U.S. at 585) (“[T]here is no evidence that the ‘invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion’ or that there is a ‘pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose.’”).

107. See *Greece*, 572 U.S. at 566 (“The Court’s inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures.”); see also *Marsh*, 463 U.S. at 792–93 (“We turn to the question of whether any features of the Nebraska practice violate the Establishment Clause.”); see also *Bormuth*, 870 F.3d at 509 (quoting *Greece*, 572 U.S. at 566) (“Our first inquiry is ‘to determine whether the prayer practice in [Jackson County] fits within the tradition long followed in Congress and the state legislatures.’”).

108. *Marsh*, 463 U.S. at 793.

109. *Greece*, 572 U.S. at 571.

110. *Id.*

111. *Bormuth*, 870 F.3d at 509.

112. See *Fields v. Speaker of Pa. House of Rep.*, 936 F.3d 142, 150 (3d Cir. 2019) (“[W]e turn to two reasons why Pennsylvania’s practice is historically sound. First, only theistic prayer can satisfy all the traditional purposes of legislative prayer. Second, the Supreme Court has long taken as given that prayer presumes invoking a higher power.”).

113. See *id.* at 164–65 (Restrepo, J., concurring in part and dissenting in part) (“[T]he majority, in my view, frames the Pennsylvania House’s guest-chaplain policy in a way that is too broad and that does not capture the true exclusionary nature of the policy.”).

114. See *id.* at 150–52 (majority opinion) (explaining that the “history and tradition” analysis need only focus on whether the chaplain selection process at issue results in an invocation that can achieve all of the goals of legislative prayer).

115. *Id.* at 150.

of an invocation prayer.<sup>116</sup> As *Greece* made clear, both religious and secular prayers are constitutional,<sup>117</sup> and the judiciary should not be concerned with the content of the resulting prayer.<sup>118</sup>

It is inconsistent with the Supreme Court's binding precedent in *Marsh* and *Greece* to find, as *Fields* did, that the U.S. Constitution permits the intentional and categorical exclusion of certain religious sects from a legislative guest chaplain program when the goal of the exclusion is to ensure that the content of the prayers offered fulfills all of the purported goals of an invocation prayer.<sup>119</sup> The purpose of the "history and tradition" test is to ensure that the legislating body upholds the Framers' model of government.<sup>120</sup> There is no evidence of a congressional historical practice of excluding individuals from the prayer opportunity merely to ensure that each message delivered satisfies a notional laundry list of goals for an opening invocation.<sup>121</sup> Accordingly, had *Fields* properly applied *Marsh*'s "history and tradition" inquiry, it would have concluded that the Pennsylvania House's process of intentionally and categorically excluding nontheists from its guest chaplain program is not constitutional because it does not fit within the traditions long followed by Congress and the state legislatures.<sup>122</sup>

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116. See *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983) ("The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief . . . . [I]t is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer."); see also *Town of Greece v. Galloway*, 572 U.S. 565, 580 (2014) ("*Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content.").

117. See *Greece*, 572 U.S. at 581 ("To hold that invocations must be nonsectarian would force the legislatures . . . and the courts . . . to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.").

118. See *id.* (quoting *Marsh*, 463 U.S. at 794–95) ("[T]he [*Marsh*] Court instructed that the 'content of the prayer is not of concern to judges,' provided 'there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.'"); see also *Marsh*, 463 U.S. at 795 ("[I]t is not for [the Court] to embark on a sensitive evaluation or to parse the content of a particular prayer.").

119. Compare *Fields*, 936 F.3d at 150 ("Legislative prayer has historically served many purposes, both secular and religious. Because only theistic prayer can achieve them all, the historical tradition supports the House's choice to restrict prayer to theistic invocations."), with *Marsh*, 463 U.S. at 792–93 (explaining that the court must determine whether the features of the prayer practice violate the Establishment Clause when "[w]eighed against the historical background" of the practice), and *Greece*, 572 U.S. at 577–81 (explaining that the court should determine "whether the prayer practice . . . fits within the tradition long followed in Congress and state legislatures" rather than determining whether the prayer practice's content is neutral).

120. See *Marsh*, 463 U.S. at 786–92 (explaining why a "history and tradition" analysis is the appropriate basis for finding that legislative prayers are constitutional).

121. See generally Lund, *supra* note 13 (discussing the history of congressional chaplaincies from 1789 to 2009).

122. See Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss at 23, *Fields v. Speaker of Pa. House of Rep.*, 251 F. Supp. 3d 772 (M.D. Pa. 2017) (No. 1-16-cv-1764), 2016 WL 9340366 ("[T]here is no long, unbroken history going back to the First Congress of what the House does: inviting members



Second, the *Fields* court erred when it failed to consider whether the Pennsylvania House's categorical exclusion of nontheists from the guest chaplain program stemmed from an impermissible motive.<sup>123</sup> Instead, *Fields* concluded that discrimination against nontheists was not the type of religious discrimination that the Court intended to proscribe in *Marsh* and *Greece*.<sup>124</sup> In *Marsh* and *Greece*, the Supreme Court made clear that the Establishment Clause prohibits guest chaplain selection processes that operate pursuant to an "impermissible motive," such as exploiting the prayer opportunity to proselytize, advance any one religion, or to discriminate against or disparage any other religion.<sup>125</sup>

*Marsh* upheld the rehiring of a long-tenured Christian chaplain because there was no proof that the chaplain's reappointment resulted from an attempt to proselytize or advance Christianity, or to discriminate against other religious faiths or beliefs.<sup>126</sup> *Greece* upheld a town's invited-speaker selection practice that resulted in predominantly Christian speakers because the Court found no evidence that the town's leaders intentionally excluded or denied any would-be speakers the prayer opportunity in an attempt to proselytize or promote Christianity.<sup>127</sup>

In contrast, in 2019, the Eleventh Circuit's *Williamson v. Brevard County* struck down a local Florida Commission's invited-speaker selection process, reasoning that the process reflected an "impermissible motive" of an unconstitutional aversion to or bias against minority faiths.<sup>128</sup> The *Williamson* court held that the Commission's intentional and categorical rejection of polytheist, pantheist, and other non-mainstream religions from a guest chaplain program exploited the prayer opportunity

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of the public to deliver invocations, while discriminating based on creed in doing so."); see also *Marsh*, 463 U.S. at 786–92 (explaining why a "history and tradition" analysis is the appropriate basis for finding that legislative prayers are constitutional).

123. See *Fields*, 936 F.3d at 157 (explaining that the court would not address the issue of whether "a 'policy of nondiscrimination' is needed to render a prayer practice constitutional."). But see *Marsh*, 463 U.S. at 794–95 ("[T]he content of the prayer is not of concern to judges where . . . there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.").

124. See *Fields*, 936 F.3d at 155–56 ("[A]s we have explained, a prayer by a Muslim is different in kind from one by a nontheist—different enough that a legislature may permissibly exclude the latter but not the former.").

125. See *Town of Greece v. Galloway*, 572 U.S. 565, 585 (2014) ("Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation."); see also *Marsh*, 463 U.S. at 794–95.

126. See *Marsh*, 463 U.S. at 793–95 ("Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his . . . tenure does not . . . conflict with the Establishment Clause . . . . The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.").

127. See *Greece*, 572 U.S. at 571 ("The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation.").

128. 928 F.3d 1296, 1314–15 (11th Cir. 2019) (quoting *Marsh*, 463 U.S. at 793–95).

to advance certain monotheistic religions by intentionally excluding minority religions whose beliefs were not the “right kind” to offer invocations.<sup>129</sup>

The Pennsylvania House’s legislative prayer guest chaplain selection process in *Fields* categorically excludes entire religious sects for the same reason that the Brevard County Board of County Commissioners categorically excluded entire religious sects in *Williamson*—because the excluded sects do not profess the “right kind” of religious beliefs to offer invocations.<sup>130</sup> Nevertheless, despite these identical fact patterns, *Fields* came to a different conclusion than *Williamson*.<sup>131</sup> While *Williamson* properly recognized categorical exclusion based solely on religious beliefs as constitutionally impermissible religious discrimination arising out of bias against certain religious sects,<sup>132</sup> *Fields* concluded that this same categorical exclusion did not constitute the kind of religious discrimination prohibited by the Establishment Clause.<sup>133</sup> The court reasoned that impermissible discrimination could be found only if the Pennsylvania House excluded religions that had the qualifications to fulfill the “necessary” element of legislative prayer—the ability to solicit divine guidance.<sup>134</sup> *Fields* held that discrimination against nontheists is not the type of religious discrimination that the Court intended to proscribe in *Marsh* and *Greece*.<sup>135</sup> It reasoned that *Marsh* and *Greece* prohibited discrimination only against individuals who profess a belief in God and were not concerned with the protection of individuals who were unqualified to lead the prayer.<sup>136</sup> *Fields* concluded that because the Supreme

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129. See *id.* at 1315–16 (explaining that the Florida commissioners exploited the prayer opportunity by “picking and choosing which religions to invite and which to reject,” taking “religious beliefs into account”).

130. Compare *Fields v. Speaker of Pa. House of Rep.*, 936 F.3d 142, 148 (3d Cir. 2019) (“[B]ecause [Plaintiffs’] proposed invocations would not appeal to a ‘higher power,’ they were turned away.”), with *Williamson*, 928 F.3d at 1299 (“Brevard County has selected invocation speakers in a way that favors certain monotheistic religions and categorically excludes from consideration other religions solely based on their belief systems.”).

131. Compare *Fields*, 936 F.3d at 149 (holding that the House’s prayer practice policy that prefers theistic over nontheistic prayers is constitutional), with *Williamson*, 928 F.3d at 1299 (“Brevard County’s process of selecting invocation speakers thus runs afoul of the Establishment Clause.”).

132. See *Williamson*, 928 F.3d at 1310, 1316 (“The selection procedures as practiced take religious beliefs into account, again favoring some creeds over others. By discriminating on the basis of religion in these two ways, the County has violated the Establishment Clause.”).

133. See *Fields*, 936 F.3d at 149 (“Because the House’s policy preferring theistic over nontheistic prayers fits squarely within the historical tradition of legislative prayer, we . . . uphold the prayer policy.”).

134. See *id.* at 153–54 (quoting *Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005)) (“[W]hether atheism is a ‘religion’ for First Amendment purposes is a . . . different question than whether its adherents believe in a supreme being.’ And only the latter question . . . is a necessary element of traditional legislative prayer.”).

135. See *id.* at 155–56 (“[A]s we have explained, a prayer by a Muslim is different in kind from one by a nontheist—different enough that a legislature may permissibly exclude the latter but not the former.”).

136. See *id.* at 155–57 (discussing the Supreme Court’s analyses in *Marsh* and *Greece* and distinguishing them from the facts in the case at hand).

Court has never implied that legislatures must allow nontheistic prayer, the court need not concern itself with discrimination against nontheists.<sup>137</sup>

Neither *Marsh* nor *Greece* limited the protections of the impermissible motive inquiry, the definition of “discrimination,” or the Establishment Clause’s acceptance of legislative prayer, to those religions that profess a belief in a divine being or God.<sup>138</sup> The language of the inquiry set out in *Marsh* and *Greece* ensures that government remains neutral with respect to all religions by presenting a clear and unqualified prohibition against the advancement of “any one” religion and the disparagement of “any other” faith or belief.<sup>139</sup> Moreover, the absence of a Supreme Court mandate compelling legislatures to allow nontheistic prayer is hardly a constitutional endorsement of discrimination against nontheists.<sup>140</sup> It is therefore inconsistent with the Supreme Court’s binding precedent in *Marsh* and *Greece* to find, as *Fields* did, that the U.S. Constitution permits intentional discrimination against nontheists in the context of legislative prayer.<sup>141</sup> Had *Fields* properly acknowledged, as *Williamson* did, that categorically excluding nontheists from a guest chaplain program solely because of their religious beliefs was precisely the type of discrimination proscribed under *Marsh* and *Greece*, it would have held that the Pennsylvania House’s selection process violated the Establishment Clause.<sup>142</sup>

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137. *Id.* at 157 (quoting *Barker v. Conway*, 921 F.3d 1118, 1131 (D.C. Cir. 2019)).

138. *See* *Town of Greece v. Galloway*, 572 U.S. 565, 581 (2014) (quoting *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983)) (“[T]he ‘content of the prayer is not of concern to judges,’ provided ‘there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.’”).

139. *See id.*; *see also Marsh*, 463 U.S. at 794–95 (“[I]t is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.”).

140. *See Greece*, 572 U.S. at 581 (“To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech . . .”).

141. *Compare Fields*, 936 F.3d at 154 (“[T]he Pennsylvania House may insist on traditional, theistic prayers.”), *with Greece*, 572 U.S. at 571 (“The town at no point excluded or denied an opportunity to a would-be prayer giver.”), *Marsh*, 463 U.S. at 793–95 (“Absent proof that the chaplain’s reappointment stemmed from an impermissible motive, we conclude that his . . . tenure does not . . . conflict with the Establishment Clause . . . The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.”), *and Williamson v. Brevard Cnty.*, 928 F.3d 1296, 1315 (11th Cir. 2019) (citing *Marsh*, 463 U.S. at 794–95) (holding that the County’s prayer policy violated the Establishment Clause because it employed a discriminatory selection process, favoring some religions over others).

142. *Compare Fields*, 936 F.3d at 154 (“[T]he Pennsylvania House may insist on traditional, theistic prayers.”), *with Williamson*, 928 F.3d at 1310 (“[L]ocal governments violate the Constitution if they organize and conduct their prayers in a way that discriminates against other religious beliefs.”).

If the *Fields* principle were adopted nationwide, the 23 percent of Americans who identify as atheist,<sup>143</sup> agnostic,<sup>144</sup> or “nothing in particular” could be categorically denied participation in a ceremonial aspect of government that is clearly revered for its tradition dating back to the First Continental Congress.<sup>145</sup> Confining the honor of guest chaplaincy to theists would communicate to almost seventy-six million<sup>146</sup> Americans that, absent an acknowledgment of a divine being or God, their messages of equality, unity, decency, hope, love, peace, compassion, tolerance, and justice are simply not good enough to warrant their participation in the government’s ceremonious prayers.

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143. An atheist does not believe in the existence of God or any other deity. *Atheism*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002).

144. An agnostic maintains a continuing doubt about the existence of a god or any ultimate being. *Agnostic*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002).

145. Aleksandra Sandstrom, *Faith on the Hill*, PEW RSCH. CTR. 4 (Jan. 3, 2019), <https://www.pewforum.org/wp-content/uploads/sites/7/2019/01/Faith-on-the-Hill-116-1.8.19.pdf> (asserting that 23 percent of Americans are atheist, agnostic, or unaffiliated with any religious group).

146. *U.S. and World Population Clock*, U.S. CENSUS BUREAU (last visited Feb. 10, 2021), <https://www.census.gov/popclock/>.